

Idaho Water Quality Standards
Regional Background and Key Issues in Idaho
July 27, 2017

Regional Background

- Dozens of tribes in the Pacific Northwest (Washington, Oregon, and Idaho) have well-established treaty reserved rights to fish in state waters; the primary purpose of those rights is to fish for subsistence.
- Contemporary fish consumption surveys document high fish consumption rates (FCRs) among tribes in the Pacific Northwest; e.g., the 1994 Columbia River Inter-Tribal Fish Commission (CRITFC) survey, which included tribes in Washington Oregon and Idaho (e.g., the Nez Perce Tribe).
- In 2011, EPA approved Oregon's revised human health criteria (HHC), which were based on a FCR of 175 grams per day (g/day) (95th percentile of the CRITFC survey) and a cancer risk level of 10^{-6} .
- In 2012, EPA disapproved Idaho's submission of revised human health criteria because the State did not consider local and regional fish consumption data, such as the CRITFC survey and other available studies.
- In November 2016, EPA partially approved Washington's submission of revised HHC based on a FCR of 175g/day and a cancer risk level of 10^{-6} . EPA also promulgated federal HHC for Washington using the same inputs, but with updates to other factors.
- In December 2016, Idaho submitted to EPA its revised HHC based on a FCR of 66.5 g/day (using recent Nez Perce Tribe survey and Idaho's survey) and cancer risk level of 10^{-5} .

Key Issues Raised in EPA's Letter to Idaho

1. Consideration of treaty reserved rights in Idaho. EPA and DEQ disagree about the application of the tribal fishing rights framework (used in Maine and Washington) in Idaho (where there are three treaty tribes: Nez Perce Tribe, Kootenai of Idaho Tribe, Shoshone Bannock Tribes).¹ Idaho's view is it is not required to adopt a subsistence use, and that its recreational use category is intended to cover recreational fishing. With respect to the tribes as the target general population, its view is that the treaties don't afford tribal fishers the same level of protection as the general population, and that it is appropriate to consider them a high-consuming sub-population protected at a cancer risk level of 10^{-4} .
 - a. Fish Consumption Rate (FCR), Idaho's use of 66.5 g/day. Idaho's selected FCR is based on the mean of the Nez Perce tribal survey data, rather than the upper percentiles (159.4 g/day for 90th, and 233.9 for 95th). The survey data does not account for suppression effects (there are numerous fish advisories in Idaho recommending limited consumption), and thus, in its January letter EPA recommended using a higher FCR (especially given the downgraded cancer risk level). The use of the mean, EPA's lowest

¹ In December 2016, one of those tribes, the Shoshone Bannock Tribe, indicated that it did not wish for EPA to rely on its treaty rights in acting on Idaho's HHC. In consultation with Department of Justice and Department of the Interior, EPA has reasoned that where tribal consultation results in a determination that an EPA action should not be informed by a tribe's treaty rights, EPA must respect the tribe's request and not act on those rights.

recommended value, coupled with the lowest recommended cancer risk, leaves little to no room to consider and account for suppression.

- b. Cancer Risk Level, Idaho's use of 10^{-5} rather than its longstanding use of 10^{-6} . EPA's 2000 Human Health Methodology that states and tribes can use either 10^{-6} or 10^{-5} to derive criteria to protect the target general population *so long as the resulting criteria are protective of the target population* (emphasis added). Given Idaho tribes' treaty rights, and EPA's framework for harmonizing those rights (including interpreting the designated use to include subsistence fishing and the need to view tribes as the target population for that use, EPA raised concerns that a 10^{-5} cancer risk level would not be sufficiently protective. In addition, DEQ's change to its cancer risk level resulted in some of the 2016 criteria being less protective than the 2012 criteria that EPA disapproved. In its letter to DEQ, EPA also noted that DEQ's change in risk level was not clearly indicated during the rulemaking process, and thus was not subject to public comment.
2. Downstream Protection. When deriving water quality standards, states must ensure that its standards provide for the attainment and maintenance of downstream water quality standards. Idaho adopted a general narrative provision that states it will provide for the attainment and maintenance of downstream water quality. In certain priority situations, however, numeric criteria may be appropriate; such as where downstream states have more stringent criteria (such as here, with respect to both OR and WA)

Potential Next Steps

Ex. 5 Attorney Client (AC)